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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

DALE E. KRAUS, ET UX., ET AL.,

Respondents/Appellees,

v.

COUNTY OF PIERCE, ET AL.,

Petitioners/Appellants,

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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41PP

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QUESTIONS PRESENTED

1. Where state courts interpreting and applying federal law have sanctioned certain police conduct, can police violate "clearly established" federal rights and lose their qualified immunity against civil suits when they act pursuant to those state decisions?

2. Has the absence of probable cause to arrest occupants of a vehicle been "clearly established" where an armed robber escapes into a parking lot adjacent to the crime scene and just moments later the suspect car is seen running two stop signs while speeding away from that lot?

3. Where police at gunpoint require suspects in a recent armed robbery to momentarily kneel and raise their hands, and where under similar facts a

more intrusive seizure a year earlier was held by the Ninth Circuit in United States v. Taylor not to constitute an "arrest," have "clearly established rights" been violated?

4. Once a Court of Appeals under Mitchell v. Forsyth has taken jurisdiction over an appeal from a denial on summary judgment of a policeman's qualified immunity, does it have pendant appellate jurisdiction over the governmental defendant where there is an overlap between the appealable and otherwise nonappealable issues?

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners: County of Pierce, Lloyd Bird and "Jane Doe" Bird, Richard Rice and "Jane Doe" Rice, Richard Shadduck and "Jane Doe" Shadduck, Kenneth Tucker and "Jane Doe" Tucker, James Andrews and "Jane Doe" Andrews, and certain unknown members of the Pierce County Sheriff's Office.

Respondents: Dale E. Kraus and Rosetta M. Kraus, Cindy D. Kraus; and Todd Montgomery.

TABLE OF CONTENTS

I. OPINIONS BELOW..... 1

II. JURISDICTION..... 1

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED..... 2

IV. STATEMENT OF THE CASE..... 2

V. REASONS FOR GRANTING PETITION... 7

A. The Court Should Settle The Split Among The Circuits On Whether State Police Lose Their Qualified Immunity By Relying On State Court Decisions Interpreting Federal Law..... 7

B. In Holding That The Deputies Did Not Have Probable Cause, The Court Of Appeals Is In Conflict With Decisions Of Other Federal Courts Which Have Found Probable Cause In Similar Circumstances... 14

C. In Holding That The Plaintiffs Were Arrested, The Court of Appeals Disregarded The Distinction Between Types Of Seizures And Ignored Its Own Precedent..... 19

D. Once An Appellate Court Has Taken Jurisdiction Over An Appeal From A Denial Of Summary Judgment On The Issue Of Qualified Immunity, It Also Has Pendent Appellate Jurisdiction Over The Governmental Employer Regarding The Overlapping Issues Of The Presence Of An Arrest And Probable Cause..... 27

VI. CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases

Beck v. Ohio, 379 U.S. 89, 91, 13 L.Ed.2d 142, 85 S. Ct. 223 (1964)..... 14

Delesteine v. Beto, 418 F.2d 871, 872 (5th Cir. 1969)..... 16

Florida v. Royer, 460 U.S. 491, 500, 75 L.Ed.2d 229, 103 S. Ct. 1319 (1983)..... 21

Gerstein v. Pugh, 420 U.S. 103, 111, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975)..... 14

Hamilton v. North Carolina, 260 F.Supp. 632 (E.D. N.C. 1966)..... 18

Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1983)..... 7,8,12

Hopson v. Wilson, 737 F.2d 1, 25-26 (D.C. Cir. 1984)..... 8

Kraus v. Pierce County, 793 F.2d 1105, 1108 (9th Cir. 1986)..... 1,7,15, 20, 28

Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975)..... 13

Owsley v. Payton, 352 F.2d 804, 805 (4th Cir. 1965)..... 12

Procunier v. Navarette, 434 U.S. 555, 565, 55 L.Ed.2d 24, 98 S.Ct. 855 (1978)..... 8

San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246, 255 (2nd Cir. 1984)..... 29

Scearce v. Field, 292 F.Supp. 807 (C.D. Cal. 1968)..... 18

State v. Donohoe, 39 Wn.App. 778, 695 P.2d 150 (1985)..... 10

State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974)..... 10

State v. Hewey, 144 Vt. 636, 471 At.2d 236, 238-39 (1983). 22

State v. Jackson, 296 Ore. 430, 677 P.2d 221-226 (1984). 22

State v. Wakeley, 29 Wn.App. 238, 628 P.2d 835 (1981)..... 11,26

State v. Young, 39 Wn.2d 910, 239 P.2d 858 (1952)..... 10

Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968)..... 19,23

United States v. Evans, 447 F.2d 129, 130-32 (8th Cir. 1971)..... 17

United States v. Hensley, 469 U.S. ___, 83 L.Ed.2d 604, 612, 105 S.Ct. 675 (1985)..... 19,23

United States v. Mitchell, 457 F.2d 513, 514 (6th Cir. 1972)..... 17

United States v. Montoya De Hernandez, 473 U.S. ___, 87 L.Ed.2d 381, 392, 105 S.Ct. 3304 (1985)..... 21,25

United States v. Sharpe, 470 U.S. ___, 84 L.Ed.2d 605, 105 S.Ct. 1568 (1985)... 21,25

United States v. Taylor, 716 F.2d 701 (9th Cir. 1983). 25,26, 27

United States v. Thompson, 558 F.2d 522, 524 (9th Cir. 1977) cert. denied, 435 U.S. 914 (1978)..... 23

United States v. Troutman, 458 F.2d 217, 220 (10th Cir. 1972)..... 17

United States v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970)..... 12

Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980)..... 9

Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986)..... 9

Zweibon v. Mitchell, 720 F.2d 162, 168-69 (D.C. Cir. 1983). 8

Constitutional Provisions

U.S. Const. Amend. IV..... 2

Other Authorities

28 U.S.C. § 1254(1)..... 2

28 U.S.C. §§ 1331, 1343(a)(1), (2), (3) and (4).. 6

42 U.S.C. § 1981, 1983..... 6

42 U.S.C. § 1983..... 2

Treatise

3 W. LaFave, Search and Seizure, § 9.2 at 29-30 (1978)..... 20

I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in Kraus v. Pierce County is reported at 793 F.2d 1105. See App. "A," p. 1.

II. JURISDICTION

The Honorable Jack Tanner, Judge for the United States District Court for the Western District of Washington, issued on September 20, 1985 an order denying summary judgment on the issues of, inter alia, qualified immunity, the existence of an arrest and of probable cause. See App. "A," p. 20. The opinion of the United States Court of Appeals for the Ninth Circuit affirming the lower court's ruling on the issues of arrest, probable cause and immunity, was entered on July 8, 1986 and amended on September 17,

1986. Rehearing was denied on October 29, 1986.

Jurisdiction is conferred on the United States Supreme Court to review this case by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. U.S. Constitutional Amendment IV: (See Appendix "D" for text.)

B. 42 U.S.C. § 1983: (See Appendix "D" for text.)

IV. STATEMENT OF THE CASE

On September 29, 1984 at approximately 7:50 p.m. James Brennan was robbed by an armed black man at the First Interstate Bank machine in the Villa Plaza shopping mall just outside the city limits of Tacoma, Washington. App. "C," pp. 1, 6-11. Robert Kay, who was waiting in his automobile to use the cash

machine, observed the incident and saw the robber run into the adjacent parking lot. Brennan told Kay that he had been robbed and, while Brennan called police, Kay attempted to pursue the robber into the parking lot. Though he lost sight of the assailant, Kay then saw a red hatchback with vanity license plate "KRAUS 2" rapidly leave the lot, run two stop signs and accelerate quickly once on the street. App. "C," p. 4. Kay observed two occupants in the car, but was unable to determine their races. App. "C," p. 13.

Kay then drove to the nearby Lakewood precinct of the Pierce County Sheriff's Office, and at approximately 7:52 p.m. reported all of the above to the deputy on duty. App. "C," pp. 4, 24-26. The sheriff's office traced the

license to the Kraus' Tacoma residence and immediately dispatched deputies to the address. There they found the suspect vehicle, its hood still warm, parked in front of the Kraus home. App. "C," p. 50. The County dispatcher then made a telephone call to Dale Kraus, asking him to step out the front door and speak with deputies investigating an armed robbery. App. "C," p. 19-22. Though Mr. Kraus professed to believe the call was a practical joke and told the dispatcher he could see no one in his yard, he stepped out the back door still holding his cordless telephone while another occupant of the house, Todd Montgomery, left through the front door. App. "C," pp. 21, 31-32, 37.

Once outside, both men walked rapidly toward the deputies who feared the

object carried by Kraus was a weapon. Believing the two men emerging simultaneously from separate exists were connected to the armed robbery, the deputies shined a flashlight, at gun point ordered Kraus to slowly put down the object and directed both men to raise their hands and kneel. It was quickly discovered that neither man met the description of the armed robber and that the object on the ground was in fact a cordless telephone. App. "C," pp. 27-28, 32, 37-38, 45-46. Both men then were told they could stand.

Dale Kraus and Todd Montgomery, as well as Rosetta and Cindy Kraus who were inside the house and who were not contacted by the deputies until after the incident, later brought suit in the United States District Court for the

Western District of Washington against Pierce County and the deputies involved, alleging jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(1), (2), (3) and (4) and asserting claims under 42 U.S.C. §§ 1981, 1983, and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

Defendants moved for summary judgment on the grounds, inter alia, that there had been no arrest, probable cause existed, and the deputies were immune from suit. Defendants' motion was denied, and though on appeal the Ninth Circuit Court of Appeals directed the District Court to grant defendants' motion on the absence of an unlawful search, it affirmed the lower court's ruling on the issues of arrest, probable cause and immunity. The court also

dismissed Pierce County's appeal on the ground it was not based on the issue of qualified immunity and therefore was unappealable.

V. REASONS FOR GRANTING PETITION

A. The Court Should Settle The Split Among The Circuits On Whether State Police Lose Their Qualified Immunity By Relying On State Court Decisions Interpreting Federal Law.

In the instant case the Court of Appeals recognized that in suits against government officials, Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S. Ct. 2727 (1982) requires a finding of qualified immunity where an officer's conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." See Kraus v. County of Pierce, 793 F.2d 1105, 1108 (9th Cir. 1986). In its analysis of this issue, however, the Ninth Circuit

disregarded the decisions of the Washington State courts binding on officers. Such an approach ignores the coordinate authority of state courts to interpret and apply federal law and literally imposes a double standard on law enforcement officials.

This Court has expressly reserved the issue of what precedents should be considered in analyzing the "state of the law" to determine if a federal right is "clearly established." Harlow v. Fitzgerald, 457 U.S. at 818 n.32; Procunier v. Navarette, 434 U.S. 555, 565, 55 L.Ed.2d 24, 98 S. Ct. 855 (1978). The federal circuit courts either have avoided deciding the issue, e.g., Hopson v. Wilson, 737 F.2d 1, 25-26 (D.C. Cir. 1984); Zweibon v. Mitchell, 720 F.2d 162, 168-69 (D.C. Cir. 1983), or come to conflicting conclusions. In the Fourth

Circuit, conduct is deemed to violate "clearly established" federal rights if the issue has been "authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state. . . ." Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980). In contrast, the Ninth Circuit gives no weight to decisions of the state where the alleged violation occurred; it examines all available decisional law, and then only where there is an absence of "binding precedent" from the U.S. Supreme Court or Ninth Circuit. Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986).

Though here the Court of Appeals cited to neither a "binding" Supreme Court or Ninth Circuit precedent, it

nevertheless found the deputies' conduct violated clearly established federal constitutional rights. 793 F.2d at 1109-10. In so doing, the Ninth Circuit disregarded Washington case law which under similar circumstances had found no violation of federal rights. See State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974) (after learning that a tavern had been robbed, police arrested occupants of a car earlier seen pulling away from the tavern); State v. Young, 39 Wn.2d 910, 239 P.2d 858 (1952) (probable cause to arrest the occupants of a panel truck existed where it was discovered 10 blocks from the crime scene after a similar truck had driven through a service station moments before it was robbed); State v. Donohoe, 39 Wn.App. 778, 695 P.2d 150 (1985) (probable cause found to arrest

occupants of similar vehicle as that seen in the vicinity of a vehicle prowl hours earlier); State v. Wakeley, 29 Wn.App. 238, 628 P.2d 835 (1981) (occupants of a car seen near scene of shooting were not "arrested" though they were forced at gun point to kneel and be handcuffed). Hence probable cause or a mere investigatory stop, and therefore immunity, would have been found if Washington State was in the Fourth Circuit or if the deputies had been sued in Washington Superior Court rather than in a federal court within the Ninth Circuit.

Clearly the Supreme Court should settle what precedent controls, and petitioners assert the appropriate analysis examines case law binding on law enforcement officials -- not the precedent binding federal circuit courts. Such a rule is consistent with the rationale behind

qualified immunity that "a reasonably competent public official should know the law governing his conduct." Harlow v. Fitzgerald, 457 U.S. at 819. (Emphasis added.) The law governing the conduct of state officials in state court, the only forum in which most officers experience court review, is not established by the decisions of the federal circuit courts but by the United States Supreme Court and the local state appellate courts. See United States v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970); Owsley v. Payton, 352 F.2d 804, 805 (4th Cir. 1965). A state official is far more inclined to be concerned with the decisions binding on him in state court because state decisions often impose even greater limits on his conduct than necessitated by the federal constitution. See

Oregon v. Hass, 420 U.S. 714, 719, 95 S. Ct. 1215, 43 L.Ed.2d 570 (1975).

The analysis applied by the Ninth Circuit allows a plaintiff to control a defendant's immunity by his choice of forum, and ignores law binding on state officials. It imposes on them the duty to keep two sets of often differing interpretations of federal law -- the decisions of state courts binding on them in their daily activities and the decisions of the circuit court in those rare instances when their conduct is scrutinized in the federal system. Such a standard requires police to have the knowledge of legal scholars rather than that of competent officials who know "the law governing [their] conduct." The standard adopted by the Ninth Circuit will paralyze the activities of law

enforcement officers in just those situations where their actions must be quick and decisive to capture criminals, protect the public and protect themselves.

B. In Holding That The Deputies Did Not Have Probable Cause, The Court Of Appeals Is In Conflict With Decisions Of Other Federal Courts Which Have Found Probable Cause In Similar Circumstances.

Probable cause for an arrest exists where there are facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." Gerstein v. Pugh, 420 U.S. 103, 111, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975); Beck v. Ohio, 379 U.S. 89, 91, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964). Here, the Court of Appeals found that the deputies did not have probable cause to believe the occupants of plaintiffs' car had committed a robbery because they did not have

information linking them or their car to the crime scene. Kraus, 793 F.2d at 1109. Such a conclusion is in conflict both with the record and the decisions of other federal appellate courts when faced with similar facts.

The affidavits of the witnesses demonstrate specific and articulable links between the vehicle, the scene of the crime and the crime itself. First, the lot out of which the vehicle exited was in close proximity to the bank where the robbery took place. The bank and the parking lot were in the same shopping mall, App. "C," p. 1, the bank was just "across the way" from the Thriftco Store, App. "C," p. 6, and the parking lot between the bank and the store was clearly visible from the spot where the robbery was committed. App. "C," p. 4.

Second, the lot out of which the plaintiff's vehicle sped just moments before had been entered by an armed robber in direct flight from his crime. App. "C," pp. 4, 6, 25. Finally, plaintiff's vehicle not only was seen speeding away from this very same lot with a driver and one passenger soon after the robber's disappearance there, but also unlawfully ran two stop signs in the driver's haste to depart. App. "C," pp. 4, 13, 25.

That such links between the plaintiff's car, the robbery and crime scene amounted to probable cause to arrest is supported by similar cases from other federal appellate courts. E.g. Delesteine v. Beto, 418 F.2d 871, 872 (5th Cir. 1969) (probable cause existed where defendant and his vehicle matched the description of a man and automobile

seen at a murder scene); United States v. Mitchell, 457 F.2d 513, 514 (6th Cir. 1972) (where a witness lost sight of an escaping robber dressed as a woman and then saw a person with earrings in defendant's vehicle, probable cause supported the driver's arrest); United States v. Evans, 447 F.2d 129, 130-32 (8th Cir. 1971) (probable cause existed where defendant's vehicle was similar to a car seen leaving an alley behind a burgled post office sometime before the burglary was discovered); United States v. Troutman, 458 F.2d 217, 220 (10th Cir. 1972) (arrested occupants of a vehicle similar to the only car seen on the street at the time a burglar alarm sounded, though no license number was obtained and witnesses saw neither the burglary scene nor the vehicle leaving

it). See also Scearce v. Field, 292 F.Supp. 807 (C.D. Cal. 1968) (arrested occupant of car seen leaving alley behind burgled tavern a few minutes after an alarm sounded); Hamilton v. North Carolina, 260 F.Supp. 632 (E.D. N.C. 1966) (arrested persons found near car similar to one seen parked the day before at a burgled company).

Even if the deputies had no right to rely on binding state precedent, the facts of the instant case provide stronger circumstances to warrant a finding of probable cause than are present in many of the above federal decisions. At the very least, these prior federal precedents demonstrate that it was far from "clearly established" that the instant facts would not provide probable cause to arrest.

C. In Holding That The Plaintiffs Were Arrested, The Court Of Appeals Disregarded The Distinction Between Types Of Seizures And Ignored Its Own Precedent.

It is well settled that where police have reasonable suspicion, grounded in specific and articulable facts, that a person was involved in or is wanted in connection with a completed felony, they may make an investigatory stop in the absence of probable cause to arrest. United States v. Hensley, 469 U.S. ____, 83 L.Ed.2d 604, 612, 105 S.Ct. 675 (1985); Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). The Ninth Circuit however found that the instant seizure exceeded the bounds of a lawful investigatory stop and constituted an arrest because an "innocent person could reasonably have believed he was not free to go and he was being taken into

custody indefinitely." Kraus v. County of Pierce, 793 F.2d at 1109. Such an analysis and conclusion is contrary to both the principles enunciated by this Court and the Ninth Circuit's previous application of those principles.

A noted authority has explained that this approach to analyzing when one is arrested would:

> . . . create a test which would cast doubt upon most stops. The typical stopping for investigation cannot be viewed as anything but a complete restriction of liberty of movement for a time. . . . A stopping for investigation is not a lesser intrusion, as compared to an arrest, because the restriction on movement is incomplete, but rather because it is brief when compared to arrest, which (as emphasized in Terry) "is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows."

3 W. LaFave, Search and Seizure, § 9.2 at 29-30 (1978). Indeed, this Court has

stated that the determination of when a seizure becomes an arrest is not rigidly controlled by the extent of the restriction but by whether the investigative detention is 1) temporary and lasts no longer than is necessary to effectuate the purpose of the stop, and 2) the investigative methods employed are the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. Florida v. Royer, 460 U.S. 491, 500, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983). See also, United States v. Montoya De Hernandez, 473 U.S. _____, 87 L.Ed.2d 381, 392, 105 S.Ct. 3304 (1985); United States v. Sharpe, 470 U.S. ____, 84 L.Ed.2d 605, 105 S.Ct. 1568 (1985).

Decisions with circumstances similar to those at bar demonstrate that the duration of plaintiffs' investigative

detention and the methods employed were reasonable. Here the record reveals that less than five minutes elapsed from the time the dispatcher called to the time plaintiffs were allowed to stand after questioning. App. "C," pp. 28, 47. Such an intrusion is clearly "de minimus" and insufficient to convert an otherwise valid stop into an arrest. See State v. Jackson, 296 Ore. 430, 677 P.2d 221-226 (1984); State v. Hewey, 144 Vt. 636, 471 At.2d 236, 238-39 (1983).

Similarly, the investigative methods employed by the deputies were the least intrusive means reasonably available to verify or dispel suspicion in a short period of time. Here the issue is not the investigatory methods used per se, but the precautions the deputies took to

protect themselves from suspected armed robbers while conducting their investigation. Police officers' drawing of their guns has been upheld as part of a reasonable investigatory stop where there is information that the suspect is armed and dangerous. United States v. Hensley, 83 L.Ed.2d at 616; United States v. Thompson, 558 F.2d 522, 524 (9th Cir. 1977), cert. denied, 435 U.S. 914 (1978). The relevant inquiry then is whether a reasonably prudent man would be warranted in the belief that his safety, or that of others, was in danger. See Terry v. Ohio, 392 U.S. at 27.

Here the deputies knew that 1) the suspect was armed; 2) earlier that evening he had threatened to use the gun in a robbery; 3) he had fled on foot into an adjoining parking lot and 4) moments

later a driver and passenger were seen in plaintiff's car racing away in an unlawful manner from the lot in the immediate vicinity of the robbery in an apparent continuation of the assailant's escape. App. "C,", pp. 13, 25, 43-44. Hence when two men left the house, where the owner of the car lived and where that car was presently parked, by separate exists contrary to the dispatcher's instructions and moved rapidly towards the officers with an object feared to be a weapon in one of the men's hands, App. "C," pp. 27, 31-32, 37, 45, the deputies had reasonable suspicion that the two men emerging from the house, were connected to the crime and might very well be armed, dangerous and attempt to escape.

A seizure is not unreasonable just because "the protection of the public

might, in the abstract, have been accomplished by 'less intrusive means.'" United States v. Montoya De Hernandez, 87 L.Ed.2d at 392; United States v. Sharpe, 105 S.Ct. at 1576. However, considering the circumstances indicating a definite threat to both the public and the deputies, it would have been reckless to have taken any less protective measures than those actually taken here.

Even assuming for the sake of argument that the deputies made an "arrest" without probable cause, it cannot be said their conduct violated "clearly established" rights. In United States v. Taylor, 716 F.2d 701 (9th Cir. 1983) the Ninth Circuit, a year before the circumstances presented here, upheld officers drawing of their weapons in self-protection where they had been told

the defendant was dangerous. That the suspect then was required to lie down at gun point, be handcuffed, searched and left in that position for three to five minutes was held by the Ninth Circuit not to convert the seizure into an arrest because "the restrictions eliminated the possibility of an assault or attempt to flee, particularly if an arrest became imminent." 716 P.2d at 709. See also, State v. Wakeley, 29 Wn.App. at 240-43 (kneeling and handcuffing do not amount to an "arrest"). Here the deputies knew the robber was armed and had earlier escaped, yet unlike Taylor the deputies only required plaintiffs momentarily to raise their hands, kneel and answer questions. Although the deputies had the right to rely on the Ninth Circuit's previous decision, the appellate court

ignored Taylor when it was raised in defendants' motion for rehearing and made no effort to explain this contrary precedent in its amended opinion.

Plaintiffs' investigatory stop was not transformed into an arrest by the deputies' conduct. Their precautions were less intrusive and shorter in duration than those in Taylor and were justified by the reasonable belief that the suspects were armed, dangerous and likely to attempt an escape. At the very least, Taylor demonstrates such conduct had in fact been "clearly established" as constitutional by the Ninth Circuit and that the deputies had the right to conform their conduct to its holding.

D. Once An Appellate Court Has Taken Jurisdiction Over An Appeal From A Denial Of Summary Judgment On The Issue Of Qualified Immunity, It Also Has Pendent Appellate Jurisdiction Over The Governmental Employer

Regarding The Overlapping Issues Of The Presence of An Arrest And Probable Cause.

The Ninth Circuit dismissed Pierce County's appeal on the ground that the automatic appealability of summary judgments involving immunity did not apply to governmental employers. Kraus, 793 F.2d at 1108. Pierce County's appeal, like that of the deputies on the issue of qualified immunity, raises the issue that plaintiffs' rights against unreasonable seizure were not violated. Because the resolution of this issue in favor of the deputies could collaterally estop relitigation of the claim against Pierce County and even necessitate a directed verdict, judicial resources would be wasted by dismissing Pierce County's appeal.

In San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246, 255 (2nd Cir. 1984) the court found that it had pendent appellant jurisdiction over otherwise nonappealable issues where it had jurisdiction over an interlocutory order denying a claim of immunity. There the court held that "once we have taken jurisdiction over one issue in a case, we may, in our discretion, consider otherwise nonappealable issues in the case as well, where '[t]here is sufficient overlap and the fact is relevant to [the appealable and nonappealable] issues to warrant our exercising plenary authority over [the] appeal.'" San Filippo, supra.

Such an overlap exists in the instant case. In analyzing the deputies' appeal of whether "clearly established" rights were violated, a court must

determine whether there was an arrest and if it was based on probable cause. These same issues are raised by Pierce County's appeal and the Ninth Circuit erred in failing to recognize its discretion to grant pendent appellant jurisdiction so as to avoid the waste of judicial resources.

VI. CONCLUSION

For the reasons stated above, a writ of certiorari to the United States Ninth Circuit should issue.

Respectfully submitted,

JOHN W. LADENBURG,
PIERCE COUNTY PROSECUTOR

By

_____
DOUGLAS W. VANSCOY,
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